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IN THE

SUPREME COURT OF THE UNITED STATES.

THE WALLACE CORPORATION,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.

No. [redacted] 66

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals,
Fourth Circuit,

and

BRIEF IN SUPPORT THEREOF.

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St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows as follows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case arises upon a petition filed in the Circuit Court of Appeals for the Fourth Circuit to review a decision of the National Labor Relations Board in a complaint case

instituted by the Board. The procedure for such review is provided by Section 10 (f) of the National Labor Relations Act [29 U. S. C. 160 (f)].

The petition to review was filed by your petitioner, The Wallace Corporation (hereinafter called the Company), which is a Missouri corporation operating a plant for the manufacture of clothespins, wood dishes and other wood products at Richwood, West Virginia, where the company employed about 200 people.

The complaint of the Board against the Company was filed on June 25, 1942, after almost a year of controversy. The complaint was filed by the Board upon written charges (S-42)* of Local Union 129, United Construction Workers Organizing Committee, a local of the CIO (hereinafter referred to as the CIO). This union had lost a Labor Board election held the previous January 30th, resulting in the certification by the Board on February 4, 1942, of a rival Independent union, known as the Richwood Clothespin and Dish Workers Union (hereinafter called the Independent), as exclusive bargaining agent (Pet. Ex. 4, S-73).

The complaint alleged the discriminatory discharge on March 17, 1942, of forty-three employees of the Company "because they were members of" the CIO and "because they were not members of" the Independent union (S-39); that the Company purported to act under a closed shop contract, and that the same was "illegal and void." The complaint neglected to mention the fact that said contract was made with a union certified by the Board itself. The complaint alleged many other violations of the act, including, notably, domination by the Company of said certified union. The Board filed this complaint, notwithstanding that an identical charge, dated October 9, 1941, had been previously made by the CIO and withdrawn, with Board approval, in connection with a strike settlement of January 13, 1942. The Board neglected to mention this settlement in the complaint. (For charge see Bd. Ex. 5, S-110;

*Pages 1 to 252 of Transcript of Record are prefixed by letter, "S" and are so referred to herein.

withdrawn in Pet. Ex. 1, S-63.) The Board, after hearing and rehearing, sustained the complaint in decision and order of June 7, 1943 (S-1), and the Circuit Court of Appeals refused to disturb the same in opinion dated February 3, 1944 (Record page 345). The order of the Board requires disestablishment of the Independent and reinstatement of the forty-three employees with a penalty of over two years back pay. The Court affirms this penalty.

At the outset the Company contested the propriety of the Board's complaint and moved for its dismissal (S-56). The Company claimed prior withdrawal and settlement (with Board approval) of the charges of domination of the Independent union, citing the strike settlement contract (S-65) and withdrawal agreement (S-63), and claimed that the discharge of which it was accused was required of it (as the Board well knew) under the terms of a closed shop contract (Pet. Ex. 5, S-75), which, in turn, it had been obligated to make under the terms of the strike settlement with the CIO and Independent, and under the certification of the Independent by the Board itself (S-73). The defense charged that both the CIO and the Board, by repudiating the settlement and election, and reopening the issues, were violating the elementary principles of equity and fair dealing; and, in effect, that the proceedings constituted an abuse of administrative discretion.

THE ISSUES.

The case therefore presents squarely the novel question of the finality of a consent election and ensuing certification of the union, and the effect of such certification upon the right of the union to make and enforce a closed shop. From the employer's standpoint, the question is whether, having relied on the certification, he can be penalized for making a closed shop contract and enforcing it at the union's insistence. The case also presents the question of

the effect of settlement between the parties (approved by the Board's agents) upon the Board's right to reopen the issues so settled.

On the facts the case is equally novel and calls, perhaps, more for a sociologist than for a lawyer's brief. The Board would have it appear that this is an ordinary unfair practice case. In order to impugn the Company's good faith and to show a discriminatory intention in a discharge which occurred on March 17, 1942, the Board has reopened a closed issue and produced evidence of events during the turmoil of a strike during the previous fall. The real issue is the effect of the settlement and certification. The power of the Board to make conclusive findings has become in this case a power to distort the issues and the facts.

What actually happened in this case was this: The CIO union undertook to organize a lumber town in the West Virginia hills.* Opposition formed under the leadership of B. E. Thompson, the editor of the Nicholas Republican, who considered the CIO was "radical" (R-138). The Independent union in this case was formed after the strike began. Thompson was called in as adviser and the new group was officered by an oiler in the company's mill room (R-198) and a machine tender in the lathe room (R-197), neither of them being foremen, but both being above the average in skill and pay.

The strike at the company's plant lasted some three and one-half months. There was a picket line and rifle fire (R-165). It was inevitable that such a strike should produce hostility and antagonisms. The Company found itself between two extremes during the whole period, between a militant CIO union and an opposition group led by the editor of the "Nicholas Republican."

It is significant that in the settlement of the strike the CIO insisted upon a closed shop clause. The settlement

*A simultaneous strike was going on at a large lumber mill adjacent to the petitioner's plant (R-248).

was a kind of "winner take all" proposal. The Board, which had previously investigated charges of company domination, was aware of the situation at Richwood. The settlement agreement was submitted to it, resulting in the withdrawal of the preceding charges of company assistance to the union. The Board conducted the election, and, when no objections resulted, certified the Independent.

When the settlement and election resulted in the harsh and vindictive exclusion of employees by the Independent the Board was appealed to by the CIO. The Board could not discipline or control the union under the Act. It is perhaps a "dead give away" of the Board's knowledge of the real source of the trouble that its first effort was to reach Thompson. An agent of the Board actually visited Thompson's employer, the Woodyard Publications, and sought to have him transferred or discharged by his employer (S-130 to 131), and threatened charges of unfair practice against the employer (S-127). (As stated in the Board's opinion, Thompson himself was joined in the original complaint against the petitioner, a joinder which even the Board's Examiner could not support.) The efforts of the Board to reach the union through Thompson failed and then the complaint was filed against this company.

The Company was not a free agent in this sequence of events. It was bound by the settlement to make the closed shop contract. It was bound by the Board's certification to make such a contract with the certified union, and when the certified union sought harshly to enforce the contract the Company felt it had no alternative but to observe its undertaking. It is now being penalized for that.

Neither the Board nor the Court can find any conspiracy between the Company and the Independent and admit the Company's prompt protest and effort to retain the employees. But neither the Board nor the Court have any difficulty in overlooking the strike settlement and the ear

tification and in imputing to the Company the hostility between the rival unions growing out of the strike and which resulted in the exclusion of members by the Independent.

The issues presented can best be defined by a brief narrative of the facts about the settlement, certification and contract which are here pleaded in defense.

BRIEF NARRATIVE.

On December 30, 1941, the bitter strike at the Company's plant at Richwood was proceeding into its fourth month. On that date the Company received the following telegram from the CIO representative (Pet. Ex. 6, S.82):

"Charleston, W. Va. Dec. 30

Charles Davis, General Manager,
The Wallace Corporation
Richwood, W. Va.

In the interests of national unity, for the sake of harmony and to prevent the possibility of bloodshed, if and when you attempt to open your plant, I have influenced your workers to make you a further compromise proposition, which is as follows Local Union 129, UCWOC, will agree, with the approval of the National Relations Labor Board, to enter into a consent election, with you and your company union, on the condition that when we prove a majority and become the exclusive bargaining agency for all your employees, that as a condition of employment all eligible employees must become members of Local Union 129, UCWOC. Wire answer.

George J. Titler,
Field Representative UCWOC"

The foregoing telegram became the basis of a written contract of settlement made by the Company with both the CIO and the Independent Union on the following January

13th (S-65). The telegram requires very brief comment. It evidences the bitterness and violence of the strike. It evidences the continued insistence of the CIO upon a closed or union shop and it evidences the belief of the CIO that it would prevail in an election, and also that the Independent was a "company union." There can, therefore, be no doubt that the CIO went into the settlement knowing that the settlement was intended to finally dispose of the question of company domination of the Independent.

The record abundantly proves that the Board itself knew at the time, of the outstanding charges of company domination. Indeed, formal charges of company domination had been filed with the Board in October, 1941, following the organization of the Independent (Bd. Ex. 5, S-116), and the Board had investigated these charges, and its representative advised the Company informally and in a summary manner that they were justified (Pet. Ex. 17, S-93). The Independent was a strike-born union, no doubt antagonistic to the CIO. The record shows also that the Company did not originate the closed shop feature, requested in the telegram of the CIO, but, rather, opposed the closed shop (S-234).

Following this telegram negotiations in settlement of the strike were opened, and in the early morning hours of January 13th the CIO and the Independent and the Company signed an agreement (Pet. Ex. 2, S-65) that the plant should be opened at 8 a. m. the same day; that everyone would return to work; that the Company would not influence in any way its employees for or against either union and the unions would not exercise any coercion. The Company agreed to recognize, as exclusive bargaining agent, whichever union was proved, by a vote conducted by the Board, to represent a majority of its employees and to start negotiations immediately after the result of the election was determined and to grant a union shop. The fol-

lowing clause about the union shop was contained in the settlement agreement (S-66):

> "The company further agrees that if either union is proven to represent a majority of its employees by said vote, it will recognize a union shop, providing that the company shall at all times retain the right to suspend, hire (sic) or discharge any employee for proper and just cause."

Wage adjustments were to be retroactive.

There is no suggestion anywhere in the decision of the Board or of the court below that this settlement agreement was fraudulent, void or even subject to suspicion. It is barely mentioned in the Board's decision and order or in the Court's opinion.

The parties appeared at the Board office and two agreements were drawn, dated January 19th, one "to dispose of" and for withdrawal of the charges of domination and other charges (S-63) and the other for a consent election in customary form (S-68). Both agreements were approved by the Board's Regional Director, in writing, after signature by all parties.

What followed this settlement was its performance. The election was held on January 30th. No formal objections were made, and the Board, on February 4th, certified the Independent as the exclusive bargaining representative for the employees in the plant (Pet. Ex. 4, S-73). In accordance with the settlement agreement and the certification, the Company and the Independent commenced negotiations. The Independent, which had shown no interest in the union shop agreement at the time of the settlement (S-228) (S-241), suddenly found itself beneficiary of a union shop clause and thereafter insisted upon it over the objections of the Company (S-132, S-225). Negotiations on behalf of the Independent were in the hands of Thompson, editor of the "Nicholas Republican."

The Court and the Board make much of the fact that the Company had warning of the hostility between the two unions, referring particularly to Thompson's letter to the Company of February 28, 1942 (Pet. Ex. 8, S-84). There could be nothing sinister or unusual about that, for any casual observer would have known of this hostility in view of the violent strike and close election (the vote was 98 to 83). The contract with the Independent required that all employees become members of the Independent within ten days. When the ten days were up, on March 17th, the Company was notified that forty-three employees were not members of the Independent, and they were laid off. The Company protested and made efforts to reinstate the employees (see Pet. Ex. 9, S-87). It considered itself bound by its contract, however, and complied, rather than risk charges of interference, or justify charges of breach of its contract. It was stipulated at the trial that thirty-one of the excluded employees had been refused membership by vote of the Independent and that twelve of them had not even applied for membership in the Independent (S-121). There is no evidence that the Company knew, at the time, of the reason why the forty-three employees were not members of the Independent. The Company did not know whether the discharged employees had been excluded from membership or had failed to apply for membership. There is no evidence that the Company then knew that these employees were members of the CIO.

THE FINDINGS OF THE BOARD.

It should be noted that neither the Board nor the Court makes any distinction between employees refused membership and employees who never applied for membership in the union. The discharge is laid at the door of the Company and said to be discriminatory, even where admittedly due to the neglect of the employees to apply for member-

ship in the Independent. The Company executives were in fact surprised and protested the Independent's vindictive action (S-243).

The Court in its opinion expresses sympathy for the Company, in view of its protest at the discharge of these employees, but affirms the conclusion that the closed shop contract was an unfair labor practice and not authorized by the National Labor Relations Act, because the Company was warned of the union's intention to exclude. The Court admits that neither the courts nor the Board are given any control over the membership of a union having a closed shop contract, and yet says that the employer in this case should have refused to discharge the non-member employees in question when the employer knew that the union excluded because of "activity in prior labor disputes."

The Court admits, as does the Board, that there was no conspiracy on the part of the Company and the Independent in this matter. The Court simply concludes, without further evidence than the making of a closed shop contract (with knowledge that there was intention to exclude) that the discharge by the Company of non-members of the union was a discharge on account of prior union activity and therefore discriminatory. There was exclusion of thirty-one employees by the union and the **union** may have "discriminated" against these thirty-one. But the **Company** did not do the discriminating against these thirty-one and **neither** the Company nor the union ever took action on the eleven employees who never tried to join the union.

But there is no question about the irregularity of the Board's action in this case. It is clear that the Board reasserted charges which were withdrawn, with its approval, on behalf of the union which had withdrawn them. It is clear that the Board knew of the union strike settlement and aided in its repudiation by reopening the issues

It is clear that the Board repudiated its own certification of the Independent and seeks to penalize the employer who had negotiated a contract with the certified union.

II.

JURISDICTIONAL STATEMENT.

Pursuant to paragraph 2 of Rule 38 and Rule 12 of this Court, the petitioner states that the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question is as follows:

1. The statutes believed to sustain the jurisdiction of this Court are Title 28, U. S. C., Sec. 347, providing that in any case, civil or criminal, in a Circuit Court of Appeals it shall be competent for the Supreme Court of the United States, upon petition of any party thereto, to require by certiorari that the cause be certified to the Supreme Court for determination by it, with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal; and also Section 160 of Title 29 U. S. C., Subsection (e), which vests exclusive jurisdiction in the Circuit Courts of Appeal of the United States (except when in vacation) to enforce any final orders of the National Labor Relations Board and providing that the judgment and decrees thereof shall be final "except that the same shall be subject to review . . . by the Supreme Court of the United States by writ of certiorari or certification as provided in Sections 346 and 347 of Title 28." And subdivision (f) of said Section 160 of Title 29 providing for petitions by persons aggrieved to the said Circuit Courts of Appeal, to modify or set aside final orders of the NLRB and which provides that "the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems

just and proper and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board." The Answer of the Board to the Petition for Review prayed enforcement of the order (R. p. 341).

2. The judgment or order of the Court sought to be reviewed was entered on the 3rd day of February, 1944, and the order of the Court was that the order of the Board be enforced as appears from page 352 of the printed record. Petition for rehearing was filed with the said Circuit Court of Appeals for the Fourth Circuit on February 28, 1944 (R. p. 353), and the said petition for rehearing was overruled by said Court by order made and entered on March 13, 1944 (R. p. 357).

III.

QUESTIONS PRESENTED.

This case presents the following questions:

(A) **As to the closed shop proviso of the Act—**

(1) Where a closed shop contract is made with a union certified by the Board as exclusive bargaining agent, pursuant to a consent election, and there is no finding of assistance to the union or other infirmity in the election, is not such election and certification conclusive upon the Board and the employer as to the capacity of the union to make a closed shop contract under Section 8 (3) of the Act; or, in the alternative, may the Board, notwithstanding the foregoing, thereafter adduce evidence of facts antedating the consent agreement (and then known to the Board) for the purpose of showing that the union was previously assisted by unfair labor practices?

(2) Whether as a matter of law, a closed shop agreement may be invalidated or held to be an unfair labor practice because of the Company's knowledge of the intention of the union to exclude employees from the

union, absent any evidence of discriminatory purpose or conspiracy on the part of the Company and in the face of evidence that the Company protested both the closed shop clause and the enforcement of the clause.

(B) **As to the abuse of administrative discretion—**

(1) May the National Labor Relations Board reopen and set aside a strike settlement agreement, a valid election, and its own certification of a union, and a subsequent labor contract with that union, on the basis of facts antedating the settlement and substantially known to the Board at the time of settlement, in the absence of a showing of fraud, concealment or imposition upon the Board in the making of such settlement and certification?

(2) Is it an abuse of administrative discretion for the Board to file and prosecute the complaint of a minority union involving charges of domination of the majority union, which charges were previously withdrawn with the full knowledge and approval of the Board, pursuant to a written strike settlement made with both unions involved, and in which settlement the Board participated by approving withdrawal of the charges, and by conducting an election pursuant to the agreement, and by certifying the majority union—absent a showing of unfair labor practices subsequent to the settlement?

(C) **As to the discharge of the forty three employees—**

(1) Whether there is any evidence in this record to support the Board's finding that the Company discharged the forty-three employees mentioned in the order because of prior union activity?

(2) Is there any evidence to support the Board's finding that the disqualification and discharge of employees for nonmembership in the Independent union can be attributed to a discriminatory purpose of the Company either with

respect to thirty-one employees excluded by the union from its membership, or with respect to twelve nonmember employees who never applied for such membership in the union?

IV.

REASONS RELIED ON FOR GRANTING OF THE WRIT.

1. The decision of the Circuit Court of Appeals for the Fourth Circuit presents a question of interpretation of the proviso of Section 8 (3) of the National Labor Relations Act, which proviso expressly validates a closed or union shop contract with a certified union. The holding of the Court that an employer may not plead such a closed shop contract with a certified union as a defense to the alleged discriminatory discharge of nonmembers of the union, but must "protect" its employees by insisting upon admission of all its employees to the union, involves an important question of federal law which has not been but should be settled by this Court. The court below justifies its ruling only because it was shown that the employer had advance knowledge of hostility between the certified union and the employees belonging to a rival union, and the probability of some exclusions from membership on that account, and sets aside the certification on the ground that the contract itself was an unfair practice.

2. The decision of the Circuit Court of Appeals involves important questions of the limits of administrative discretion. The said decision approves the filing and prosecution of a complaint in which both the Board and the complaining union ignore a prior strike-settlement agreement, and in which the Board repudiates its own certification, and then invalidates and nullifies a contract made in reliance upon the same, and even penalizes the employer for such reliance. The Board and the Court sustain such

complaint only on the basis of facts antedating such settlement and well known to the Board at the time of such settlement. Furthermore, in affirming the Board's decision invalidating its own acts, the Court does not scrutinize or weigh the evidence, but adheres to the presumption that the findings are correct if supported by substantial evidence. This holding of the Court so far sanctions departure by an administrative Board from the accepted and usual course of administrative and judicial proceedings as to call for an exercise of this Court's power of supervision.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals, had in the case numbered and entitled on its docket No. 5135, The Wallace Corporation, Appellant, v. National Labor Relations Board, et al., Respondents, to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States, and that judgment herein of said Circuit Court of Appeals be reversed by the Court and for such further relief as to this Court may seem proper.

Dated April 20, 1940.

THE WALLACE CORPORATION,
By LYLE M. ALLEN,
Counsel for Petitioner.

R. WALSTON CHUBB,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE WALLACE CORPORATION,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.

No.....

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion in the Circuit Court of Appeals for the Fourth Circuit appears at page 345 of the record, where the opinion is copied, and is reported in 141 Fed (2d) 87.

II.

JURISDICTION.

1. The date of the judgment to be reviewed is February 3, 1944. Petition for rehearing was denied on March 13, 1944. Copy of the said order denying petition for rehearing appears at page 357 of the record.

2. The statutory provisions which are believed to sustain the jurisdiction of the court are set forth in the petition for the writ of certiorari filed herewith and are briefly as follows: 28 U. S. C., Sections 346 and 347; 29 U. S. C., Section 160 (e) and (f).

III.

STATEMENT OF THE CASE.

A general statement of the case appears in the preceding petition, which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

Errors on Issues of Fact.

1. The Court erred in holding that there was substantial evidence to support the Board's finding that the Company discharged the forty-three employees mentioned in the order because of prior union activity or with discriminatory intent.

2. The Court erred in respect to the following erroneous conclusions which are unsupported by the evidence:

(a) That at the time the Company discharged the forty-three employees "it knew that thirty-one of these employees had applied for membership in the Independent and had been rejected";

(b) That the Company "acquiesced in the conduct of the Independent union" for the reason that (to the extent that such finding implies silent approval or absence of protest) there is no evidence to support such conclusion and for the further reason that such holding ignores the admitted fact that the Company was bound by the strike-settlement to make a union shop contract and bound by such union shop contract to deny employment to non-member employees;

(c) That the conduct of the Company was "oppressive and high handed" for the reason that there is no evidence to support such conclusion and for the further reason that said conclusion is inconsistent with the Court's later statement that the conduct of the Independent union was high handed and that the Company merely acquiesced in the same.

Errors of Law (Closed Shop).

3. The Court erred in holding that a closed shop or union shop contract authorized by section 8 (3) of the Act was invalidated by knowledge on the part of the employer of the intention of the union to exclude from membership employees hostile to the union (members of a rival union which had conducted a violent strike) and in holding that the Company was under a duty to disregard its union shop contract in order to "protect" such excluded employees and under a duty to insist upon their admission to the union.

4. The Court erred in holding that the closed shop proviso of the National Labor Relations Act [Section 8 (3)] validating contracts which required membership in a union as a condition of employment also requires a union holding such contract to admit all employees of the employer to membership if they apply and is not binding on the employer if the union excludes any employee on the ground of hostility of such employee to the union.

5. The Court erred in holding that the discharge of ~~eleven~~ twelve out of the forty-three employees of the Company who were non-members of the union was discriminatory, it being stipulated and conceded that said ~~eleven~~ twelve employees never applied for membership in said Independent union, for the reason that there is no evidence to support the charge of discrimination and for the further reason that even under the theory of the Court there was no

act of discrimination against said employees on the part of either the Independent or the Company.

6. The Court erred as a matter of law in holding that the closed shop proviso of the Act [Section 8 (3)] was never intended to authorize the majority (referring to the majority union) to exclude and thereby discriminate against a minority (referring to the members of the minority union) because the majority concluded the minority were hostile to the majority union—for the reason that the Act does not purport to regulate and prohibit unfair labor practices of union organizations and expressly legalizes a closed shop contract.

Errors in Respect to Administrative Discretion of the Board.

7. The Court erred in holding that it was within the administrative discretion of the Board to disregard the strike settlement agreement approved by the Board, and to disregard the certification of the Board which followed, and erred in holding that such settlements are not to be observed in all cases but should only be observed "ordinarily," and in holding that such administrative orders of the Board may be disregarded, but not "lightly."

8. The Court erred in sustaining the Board's denial of the petitioner's motions to dismiss, for the reasons (a) that it was an abuse of administrative discretion for the Board to file and prosecute a complaint involving charges of domination of an alleged company union when the same charges had been previously withdrawn, with the full knowledge of the facts and approval of the Board, pursuant to a written strike settlement of which the Board was

of the capacity of the union to make a closed shop contract, and not subject to be set aside by reason of facts antedating the consent election agreement and known to the Board.

9. The Court erred in its failure to recognize that the Board in this case was passing upon the validity of its own acts, and in such a case should not be entitled to the benefit of the presumption that its findings are valid if supported by substantial evidence, but on the contrary, all the evidence should be considered.

V.

ARGUMENT.

SUMMARY STATEMENT OF ARGUMENT.

(A) The court below has erred as a matter of law in holding that the making of a closed or union shop contract with a certified union is invalid under the closed shop proviso of Section 8 (3) of the National Labor Relations Act, and therefore constitutes an unfair labor practice, solely upon the ground that the employer had advance knowledge of hostility between such certified majority union and a rival union, and was warned of probable exclusions of employees from membership on that account it being admitted that the employer had previously agreed to grant such closed or union shop contract to either union according to the Board's certification.

(B) The Court erred in failing to hold the Board to accepted standards of fair dealing in the following respects: (a) in approving a complaint of the Board which was filed in violation of a settlement agreement approved by the Board; (b) in permitting the Board to vacate and set aside its own certification of a union as bargaining agent after an election held pursuant to a strike settlement, without evidence of unfair practices affecting such settlement or election; and, (c) in nullifying a contract entered into by an employer in reliance upon such certification by the Board.

(C) The Court erred in failing to scrutinize and weigh the evidence upon which the Board repudiated a settlement previously approved by it and a certification by the Board, and in upholding such repudiation on the presumption that the findings of the Board were valid if supported by substantial evidence, even though the Board was passing upon the validity of its own acts.

ARGUMENT.

(A) **The court below has erred as a matter of law in holding that the making of a closed or union shop contract with a certified union is invalid under the closed shop proviso of Section 8 (3) of the National Labor Relations Act and therefore constitutes an unfair labor practice, solely upon the ground that the employer had advance knowledge of hostility between such certified majority union and a rival union and was warned of probable exclusions of employees from membership on that account, it being admitted that the employer had previously agreed to grant such closed or union shop contract to either union according to the Board's certification.**

The Company had agreed to make a closed shop contract in connection with the strike settlement and considered that it was bound to perform such contract when made. As an alternative to breach of contract with a certified union, the Company chose to discharge employees who had failed to become members of the Independent union. The Independent was certified by the Board and the Board knew why the contract had been made.

The Board and the Court have nevertheless held that the making of the closed shop contract was in bad faith and constituted an unfair labor practice on the part of the Company, because the Company had warning that it would be used to exclude unnamed nonmember employees. This holding that the making of the closed shop contract was an unfair labor practice had a far-reaching effect, in that the Board thereby felt that it was justified in setting aside its prior certification, and disregarding the settlement contract, and reasserting and reinvestigating the same charges of Company domination which had been withdrawn with its approval when the settlement was made.

The theory of the Board and of the court below in holding the closed shop contract invalid is as follows: Ordinarily, unfair labor practice cannot be predicated on the discharge of an employee because he is not a member of a certified union holding a closed shop contract with the employer. Such discrimination is permitted by Section 8 (3) of the Act.* This provision of the act must be construed, however, says the court, "in the light of the general purpose of the statute" which was to provide representation for all employees by an agent chosen by the majority. The Court says that the proviso "was never intended to authorize the majority to discriminate against a minority because of prior union or anti-union activities" (meaning activities hostile to the majority, no doubt).

It will be seen that here the Court definitely takes the position that a closed shop contract is not intended to authorize the majority **union** to "discriminate" against a minority union because of prior opposition of the minority to the majority union. The Court admits that neither the courts nor the Board are given any control over the membership of a union holding a closed shop contract. The holding of the Court clearly indicates, however, that an **employer** must exercise such control if the majority becomes vindictive. The court below takes the final step in its illogical progression by transferring and imputing to the employer the discrimination exercised by the majority union and says that the Court's conclusion "means merely

*Sec. 8. It shall be an unfair labor practice for an employer

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, that nothing in this Act, or in the National Industrial Recovery Act, as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in this act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a) in the appropriate collective bargaining unit covered by such agreement when made.

that such a contract does not excuse a discharge when membership in the union to the knowledge of the company is denied on the ground of activity in prior labor disputes." There is no escape from the conclusion that under the Court's doctrine the Company's knowledge of union motives alone would give the Company the right to disregard its own contract and dictate admission to membership in the union. Is not such interference manifestly in violation of the injunction of Section 8 of the Act? Is it not "encouraging or discouraging membership in a labor organization"? The Court, however, purports to hold that the employer may so violate the Act, because the closed shop clause must be interpreted "in the spirit of the Act."

This petitioner does not propose to defend the closed shop provision of the Act. The Company was required in this situation, however, to determine its own obligations under such a contract, in the face of the union demands. Petitioner submits that, factually and historically, a closed shop contract means the right to exclude on the part of a union:

> "Discharge of unionists from positions or occupations covered by the closed shop agreement is an essential part, implied or expressed, of every such agreement." Toner, "The Closed Shop," Washington, D. C., 1942, page 36.
>
> "The result of a valid closed shop contract is to require the employer on demand by the controlling union and for its benefit to make use of just the sort of coercion which the law forbids the employer to use for his own benefit." Wilcox, Triborough case, 56 Har. Law. Rev. 584.

Discharge of members of a rival union has been approved by the courts notwithstanding they were old employees of the employer. In **NLRB v. Lion Shoe Co.** (C. C. A. 1st, 1938), 97 Fed. (2d) 448, the Court upheld a closed shop

contract with an independent union after dispute with an A. F. of L. union and clearly countenanced the discharge of nonmember employees.

The Supreme Judicial Court of Massachusetts has recently construed the closed shop clause in the case of **Hamer v. Nashawena Mills** (1943), 52 N. E. (2d) 22.* In this case the plaintiffs were employees of the mill which had, prior to 1943, been organized by an A. F. of L. union with a closed shop. When this contract with A. F. of L. terminated, an election was held and a CIO union was certified, and made a contract with the textile mills which also contained a closed shop clause. The contract gave employees thirty days in which to join. The suit was brought by employees of the mills who had been solicited to join the CIO, but who refused to join and refused to quit their jobs. (There was a saving clause in the contract that permitted employment of nonunion employees if they could not be replaced by the union.) The Court said it was fairly inferable that if a supply of labor became available the plaintiffs would be discharged. The plaintiffs sought an injunction, which was denied by the Court. The Court said the defendant union had been elected by a majority of the employees of the bargaining unit, to which the plaintiffs belonged, and that the union was acting "not merely for its own members but as the representative of all employees included in the unit." The Court held the plaintiffs had surrendered to the union their right to deal individually. The execution of a closed shop agreement by this union was permissible, the Court said, under the state and federal law and the union had the right to determine working conditions, including authority to agree upon a closed shop.

The Court pointed out that the defendant union was expressly designated by the National Labor Relations Act

*This case was cited to the court below, after submission, in a supplemental brief, but is not mentioned in the opinion.

as the exclusive bargaining representative of all such employees and said:

> "It would be strange if an employer who is required to enter into negotiations for a contract with the designated union and who, in the event that the execution of a contract results, is bound to observe its terms and provisions, would not be able to enforce the contract which settled wages, hours of labor and other working conditions because he agreed with the union to conduct a closed shop. To set aside a contract upon that basis would be contrary to the public policy of the nation. * * * There is nothing in the plaintiffs' contention that the defendant union was without power to execute a closed shop agreement."

The decision in this case is clearly contrary to the views of the court in the instant case, to the effect that the closed shop "was never intended to authorize the majority to discriminate against a minority because of prior union or antiunion activities." The case holds that the majority has a right to dictate a closed shop and thereby exclude such of the minority as fail to join the majority union. The ruling applies to at least twelve employees in our case. It indicates the validity of exclusion, by the majority, of all forty-three here involved, unless it be held that the union's motives for exclusion affect the right. (In any view, the exclusion in the instant case was not the act of the Company.)

There is also evidence in the legislative history of the Act that Congress, in adopting the closed shop proviso, intended to leave in union hands complete control of union membership, including the right to exclude. Congress was accused of throwing its influence in favor of the closed shop, at all times a controversial subject, and the Senate Committee found it necessary to disclaim such intention (Senate Report on Labor Bill, S. Rep. 573, 74th Congress, First Session; p. 12):

"The proviso attached to the third unfair labor practice deals with the question of the closed shop. Propaganda has been widespread that this proviso attaches special legal sanctions to the closed shop or seeks to impose it upon all industry. This propaganda is absolutely false. * * *

"In other words, the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal; it does not interfere with the status quo on this debatable subject but leaves the way open to such agreements as might now legally be consummated, with two exceptions about to be noted."

On the next page the Senate Committee admits the discriminatory and coercive character of the closed-shop proviso in the following words:

"Majority rule, it must be noted, does not imply that any employee can be required to join a union except through the traditional method of a closed-shop agreement made with the assent of the employer and since, **in the absence of such an agreement**, the bill specifically prevents discrimination against anyone, either for belonging or not belonging to a union, the representatives selected by the majority will be quite powerless to make agreements more favorable to the majority than to the minority." (Emphasis ours.)

Note that the Senate Committee says "in the absence of" a closed-shop agreement, discrimination is not possible by the majority.

No authority has hitherto been cited which is contrary to the position of the petitioner, except the case of **National Labor Relations Board v. Electric Vacuum Cleaner Co. et al.** (1942), 315 U. S. 685, 86 Law. Ed. 1120, holding a closed shop contract invalid if the union, prior to the making of the same, had been assisted by the company. In

that case it was not knowledge of the intention to exclude which led this Court to hold that the closed-shop contract was no defense and could not justify discharges of existing employees. On the contrary, the Court found clear evidence that prior to the execution of the closed-shop contract the employer had assisted the union holding such contract by inducing employees to join such union. No certification by the Board was involved. The case clearly implies that a closed-shop contract would justify the discharge of existing employees even though it was shown that they had been previously affiliated with a minority union.

The court below suggests that the Company in its collective bargaining "should have seen that provisions were inserted in the contract that would have protected" the rights of minority employees. The Court assumes, without warrant, that the employer made no attempt to do so. The Court assumes that the employer could have forced such concession upon the union and assumes further that the employer had a right to insist upon that interpretation of its agreement to make a closed-shop contract. The Court assumes that the employer could force the union to be reasonable.

We might admit that any closed shop would be more humane if it implied in every case a requirement of an open union as to existing employees. We do not believe that such an intention can be read into the statute which has been adopted by Congress. A closed shop implies exclusion by the union, free from employer control.

There is a suggestion in the recent decision of this Court in **Medo Photo Supply Corp. v. NLRB** (U. S. Supreme Court, No. 265, April 10, 1944), that your petitioner was correct in assuming that the Independent union had rights independent of its members and that this employer would have been guilty of interference and violation of the act if he had insisted upon jobs for non-members of the union. It appears to your petitioner, in short, that the benevo-

lent suggestions of the court below resolve themselves into a judicial sanction for breach of contract by this petitioner. Aside from other scruples, breach of contract could not be held to promote either collective bargaining or industrial peace, which is the declared purpose of the National Labor Relations Act.

(B) **The Court erred in failing to hold the Board to accepted standards of fair dealing in the following respects: (a) in approving a complaint of the Board which was filed in violation of a settlement agreement approved by the Board; (b) in permitting the Board to vacate and set aside its own certification of a union as bargaining agent after an election held pursuant to a strike settlement, without evidence of unfair practices affecting such settlement or subsequent thereto; and (c) in nullifying a contract entered into by an employer in reliance upon such certification by the Board.**

We submit that the Court has erred in approving manifest abuses of administrative discretion in this case. The specifications set forth in the above point may be somewhat enlarged as to the facts by the following recapitulation:

The Board's opinion in this case opens with a recitation of highly prejudicial testimony of interested witnesses about the events leading to the strike in September, 1941, thus seeking to justify the Board's duplicity in June, 1942. The Company is falsely placed in the position of arbitrary opposition to the CIO union and as sponsor to the group which opposed it, and which eventually won the election. The statement of facts by the Board and the Court ignores the intervening settlement, and most of the Company testimony.

On the facts, however, there can be no dispute that the Board approved and in fact required the withdrawal of charges of domination of the Independent union in con-

nection with the strike settlement, having full knowledge of the facts, and then, after participating in such settlement by holding an election, it reasserted the identical charges and reopened the controversy on identical facts when one of the unions prevailed and harshly insisted upon the terms of the settlement.

There can also be no argument that the Board followed this reassertion of charges by setting aside the settlement and reopening the controversy over the protest of the employer.

There is no dispute also that the Board led the employer in this case, by its certification, to bargain with a union and then after the employer made a contract pursuant to the certification, the Board vacated the certification and nullified the contract.

The Board states that it would not ordinarily re-examine the facts antedating a certification except upon proof of unfair practices subsequent to the certification. It finds such justification only in the making of the closed shop contract by the employer coupled with knowledge by the employer that the certified union was likely to enforce such contract, and actual harsh enforcement by the Independent union. It is notable that the Board has in its brief denied conspiracy between the Independent and the employer, and the Court likewise states in its opinion that there was no conspiracy between the employer and the union.

The conduct of the Board and its approval by the court below appears the more erroneous and unjustified because the Board and its agents and the Court alike, in appraising the good faith of the employer, overlook and ignore the fact that the employer had no choice in making the closed shop contract. It was bound to make such contract by the terms of the strike settlement regardless of which union prevailed in the election.

Authorities.

It will be observed that the petitioner does not phrase this argument in the language of res adjudicata or estoppel. The case presents, of course, a perfect example of estoppel. The certification of the union as exclusive bargaining representative had no other purpose than to induce the petitioner to act and to act as it did. The petitioner then acted in reliance upon the certification and made a contract as it was previously bound to do. Should not the Board be estopped to set aside this contract, and even more than that, to assess the penalties of back pay?

The withdrawal of charges of domination of the Independent union, in connection with the strike settlement, also bears some analogy to a dismissal with prejudice in a court. It warrants a plea of res adjudicata. Such dismissal was required by the Board as a condition precedent to the conduct of a consent election and was part of the settlement.

The National Labor Relations Board itself has in effect recognized the doctrine of estoppel by holding that "the effective administration of the Act requires that settlement agreements in which the Board's agents participate should be respected." **Wickwire Bros.**, 16 NLRB 316; **Hope Webbing Co.** and **Textile Workers Organizing Comm.**, 14 NLRB 55; **Matter of Godchaux Sugar, Inc.**, 12 NLRB 568; **Corn Products Refining Co.** and **United Cannery Workers of America** (1940), 22 NLRB 824; **Shenandoah Dives Mining Co.**, 11 NLRB 885.

In the last cited case the doctrine of the Board on the subject of compromise agreements is stated as follows, l.c. 888:

> "Although we do not agree that the compromise agreement estops the Board from proceeding herein, we believe that effective administration of the Act requires that the Board's agents have the respect and confidence of labor organizations and employers with

whom their work brings them in contact. Repudiation of agreements entered into and relied on in good faith necessarily impairs such respect and confidence. . . . The respondent apparently relied and acted upon the agreement, reinstating an employee, the legality of whose discharge had not been adjudicated. We believe the policies of the Act will best be effectuated by giving effect to the agreement and refraining from consideration of the alleged unfair labor practices. The complaint will be dismissed."

In the general field of administrative law the decisions are not particularly helpful. **Houghton v. Payne**, 194 U. S. 88, 48 Law. Ed. 888, was a case involving a certification of the "Riverside Literature Series" as second class matter and this certification was pleaded as a bar to a change in ruling by the Postmaster General. This Court quoted **U. S. v. Alabama G. S. R. Co.**, 142 U. S. 615, to the effect that the Court looked with disfavor upon any change in rulings whereby parties might be injured who had contracted with the Government on the faith of a former construction. The Court, however, approved the change in classification because there was no such injury. The case is of interest simply because it is based so clearly upon the fact that no vested rights had attached and no contract was impaired by the revocation of the certification. There are, of course, many cases to the same effect in the law affecting administrative officers.

The Tenth Circuit Court of Appeals held in **Magnolia Petroleum Co. v. NLRB**, 115 Fed. (2d) 1007 (in respect to two out of thirty-four of the company's operating districts), that where consent elections had been held by the Board and unions had been certified, such elections and certifications barred disestablishment of the unions in these two districts.

We prefer to rely in the instant case upon the doctrines which underlie the rules of estoppel and res adjudicata,

rather than on the adjudicated cases. The underlying doctrine is fair play. The CIO made a settlement proposal which was accepted, and when they lost, they refused to abide by their agreement. To use the vernacular, they "welched" on their contract. The Board supported them by bringing this complaint. The Board itself participated in the settlement and certified the union, with no other object than to induce this employer to bargain with the certified union. Furthermore, the Board knew that the petitioner was obligated by the settlement to make a closed shop contract as a result of such certification. And now the Board not only finds this conduct of the employer to constitute an unfair practice, but has assessed heavy penalties for back pay upon the employer for so carrying out its contractual obligations.

(C) **The Court erred in failing to scrutinize and weigh the evidence upon which the Board repudiated a settlement previously approved by it and a certification by the Board, and in upholding such repudiation on the presumption that the findings of the Board were valid if supported by substantial evidence, even though the Board was passing upon the validity of its own acts.**

The Court in this case accepts, as true the "findings" of the Board which, upon alleged substantial evidence, support the opening thesis, that this employer from the outset was unfair to organized labor. Petitioner respectfully submits that this is not to be tolerated, in a case where the Board has repudiated and is passing judgment upon its own acts.

There can be no doubt upon the facts of this case that in nullifying its own certification and in setting aside a settlement which it approved the Board is passing upon the validity of its own acts. The Board thus passes upon

that its findings are correct if supported by substantial evidence.

We have found no case in which any court has so applied the presumption. It is bad enough to permit an administrative Board to pass judgment upon others, where such Board is acting as complainant, prosecutor and judge. But how fraught with danger is a rule which permits any semi-judicial body under such a procedure, not only to act as judge in its own case, passing judgment on its own acts, but even arms and protects such power by a presumption in its favor, if any evidence can be found to warrant it.

The danger in indulging in such presumptions in a case of this kind was recognized by the Circuit Court of Appeals for the Third Circuit in **NLRB v. Sun Shipbuilding and Dry Dock Co.** (C. C. A. 3rd, 1943), 135 Fed. (2d) 15. This was a consent election case in which the Independent union prevailed and was certified. Charges were tardily filed and a Board complaint followed, with an order of disestablishment. The Court held there was no substantial evidence to support the Board's finding, but by way of dictum commented on the danger of repudiating certifications.

In referring to the Board's order disestablishing a union which it had itself certified, the Court said:

> "But manifestly the possibilities inherent in the exercise of such power, upon a complaint filed long after a theretofore unquestioned certification and for matters which allegedly occurred in the formation of the bargaining agent prior to the election, are so vast in their implications as to require an especially detailed scrutiny of the evidence in order that it may be determined with reasonable certainty whether the findings whereon the Board directs disestablishment

There are two circumstances in this case which indicate the danger of presumptions that the Board's findings are justified.

The first circumstance arises from the hardship of this case, namely, *the discharge of forty-three employees* and the fact that if the hardship resulted from the act of the union the Board was, under the terms of the National Labor Relations Act, without power to control such acts of the union. There is accordingly a great temptation for the Board to attempt to rectify the situation by placing the responsibility upon the employer and proceeding against the employer. We contend that this is exactly what has been done.

The second circumstance which indicates the danger of such presumption lies in the nature of central issue in this case: The good faith of the Company. The main accusation against the Company is a discriminatory intention or state of mind in discharging the employees. The offense is not the discharge; the offense is the intention or state of mind of the Company. Both the Board and the Court constantly charge the Company with discharging the employees "because of prior union activities," which of course is a matter of motivation or state of mind. The Company's defense to this charge was based upon objective facts susceptible of proof, namely, that the employees were not members of the Independent (which was admitted); that the Company had made a closed shop contract with the Independent union (which is admitted) and that the Independent union was certified by the Board (which is admitted) and that by the terms of the contract the employees were not eligible for employment (which is admitted). The good faith of the contract itself is supported by the fact that the Company was bound to make a closed shop contract at a time when it could not determine which union would have the benefit of such a contract, namely, in the strike settlement agreement.

The determination and finding of the Board that the discharge was discriminatory is therefore based upon inferences and it can hardly be disputed that such inferences are supported principally in this case by the findings of the Board as to acts antedating the strike settlement.

The Court in this case does not attempt to examine and weigh the evidence supporting the Board's findings but in stating the facts simply states that "there is evidence to support" such findings. The Court has apparently entirely excluded consideration of the fact that the company executives denied the evidence of the discharged employees as to the statements of foremen and supervisory employees in regard to the attitude of the Company. The Board and the Court have credited the testimony of these highly interested witnesses and completely disregarded the Company's testimony, notably: the fact that the Company was willing at the outset to determine representation by a Labor Board election; that the Company used every reasonable persuasion to induce the Independent to relent in its insistence upon the discharge; and the fact that the Company was bound to make the closed shop contract and bound to perform the closed shop contract.

The petitioner's request for review of this case is further supported by the manifest errors in fact which are disclosed by the Court's opinion. For example, its finding that the Company knew at the time of the discharge that thirty-one of the employees had applied for membership in the Independent and had been rejected. The Board did not so find and there is no evidence to support this statement. Furthermore, the Court refers to the Company's acquiescence in the conduct of the Independent in one place and in another refers to the "oppressive and high-handed conduct of the parties." The Court has furthermore adopted the language of the Board to the effect that the employees in question were discharged because of "prior union activity" when it is obvious from all of the facts, including

the express statement of the Independent, that the reason for exclusion was hostility of the employees to the Independent union.

Then, of course, there is the wholesale treatment of the forty-three employees. It was stipulated that twelve of these never applied for membership in the Independent union. Yet the Court bases its decision upon the fact that membership in the Independent was denied to all forty-three.

Lastly, the court below has piled inference upon inference by concluding that the motives expressed by the Independent union should be ascribed or imputed to the Company merely because the Company had knowledge of the hostility.

CONCLUSION.

We respectfully submit that this case should be reviewed by this Court. It involves a novel question regarding the closed-shop proviso of the Act, and questions of administrative procedure in the important field of labor relations. The decision of the court below has left this petitioner with the impression that the contract aspects of the case have been ignored. The decision and action of the Board and its agents have left the impression that the observance of settlements and of contracts is an anachronism having no place in the field of labor relations. Petitioner submits, on the contrary, that it will not assist in the solution of these controversial problems, for the courts to countenance, much less encourage, breach of contract.

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